BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. MARTIN Claimant	)	
VS.	)	Docket No. 1,022,207
CNH AMERICA LLC Self-insured Respondent	)	

ORDER

Claimant requested review of the August 21, 2006, Award entered by Special Administrative Law Judge John Nodgaard. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Randy S. Stalcup, of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Special Administrative Law Judge (SALJ) concluded that claimant's avascular necrosis was not caused by claimant's work activity. The SALJ also concluded that the term "aggravate," as used by Drs. Paul Stein and Pat Do, refers to an increase in symptomatology and not to a change in the physical structure of the body. Therefore, the ALJ found that claimant had not met his burden of proving entitlement to benefits under the Workers Compensation Act.

Claimant requests review of the following issues: Whether claimant suffered personal injury by a series of accidents commencing May 2004; whether claimant's accidental injuries arose out of and in the course of his employment; whether claimant is entitled to temporary total disability benefits from February 18, 2005, until May 22, 2005;

whether claimant is entitled to payment of his medical expenses by respondent, authorized and unauthorized; and the nature and extent of claimant's disability.

Respondent argues that claimant has not met his burden of proving his work duties at respondent caused, aggravated or accelerated the avascular necrosis condition in his hips. In the alternative, respondent argues that 90 percent of claimant's disability is from his avascular necrosis condition and, therefore, claimant would be entitled to only 10 percent of any disability determination. In that event, respondent argues that Dr. Do provided the only credible testimony concerning impairment, and claimant should be given an award based on a 3 percent permanent partial impairment to the body as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked at respondent as a fabricator for many years, which he described as a physically demanding position. In 2002, claimant was transferred to assembly work. His job tasks changed, and instead of standing and climbing steps to get parts, he had to bend over, kneel, twist, and get on a creeper to work underneath the unit.

In May 2004, claimant started noticing pain in the back of his right hip. He said that virtually any movement, whether it be walking, bending, or stooping, would cause him difficulty but his main problems occurred when he was walking. He would have problems whether he was at work or not at work. He testified that he walked a lot in his job and did more walking as an assembler than as a fabricator. He had never experienced problems with his right hip before May 2004.

Claimant first saw the company doctor, from whom he received Vioxx. In September 2004, claimant saw Dr. Richard Glover. In December 2004, he saw Dr. Vello Kass, who diagnosed him with avascular necrosis of both hips. Dr. Kass performed hip replacement surgery on claimant’s right hip on March 4, 2005, and on his left hip on April 1, 2005. Claimant missed work from February 18, 2005, until May 22, 2005. He returned to work at respondent and continues to work in the same position as before his surgeries. However, he no longer gets on the creeper. He is paid the same as before his surgeries and works the same number of hours.

Currently claimant suffers a little ache in the femur on his right and left sides. This pain occurs periodically–every couple of days to a week. He does not have the pain on his left side as often as he does the right.

Claimant does not have any hobbies. He watches television in his free time. He admits that he has smoked for 25 years and currently smokes one and one/half packs a

day, down from two and one/half packs a day. He also has a serving or two of alcohol per day and has been drinking that much since he was 18.

Dr. Paul Stein, who is board certified in neurological surgery, performed an independent medical evaluation of claimant on June 10, 2005, at the request of Administrative Law Judge (ALJ) Barnes. Dr. Stein defined aseptic necrosis, which is also known as avascular necrosis, as the death of tissue due to a lack of blood supply. The main cause of avascular necrosis is fracture. Other causes include chronic use of steroids, tobacco/alcohol abuse, connective disease, or liver dysfunction. Dr. Stein did some research and did not find anything that indicated avascular necrosis was an occupational disorder other than from a fall that would break a hip.

Dr. Stein believes that the cause of claimant's avascular necrosis is his cigarette smoking. Dr. Stein said claimant was a very heavy cigarette smoker and that was a major contributing factor, if not the sole factor, of his avascular necrosis.

Dr. Stein stated that the onset of avascular necrosis would initially be painless. It only becomes painful when the hip starts to deteriorate from the loss of the blood supply. Accordingly, claimant would have had avascular necrosis before he experienced any type of problems with his hips at work. Furthermore, any effect from the work activity would be relatively minor compared to the other factors.

Dr. Stein opined that if he had to put it in percentages, he would say that 90 percent of claimant's disability was caused by the underlying disease and 10 percent was from work activity. However, he also stated that avascular necrosis could be 100 percent of the problem, because once avascular necrosis starts, it goes on no matter what activities are performed. Dr. Stein said that avascular necrosis is unlike degenerative disease because people can have degenerative disease without being symptomatic until it gets very severe. In that case, trauma, even minor trauma, can aggravate the degenerative disease and make it symptomatic. Avascular necrosis is a deteriorating process that is much more rapid and progresses under any circumstance.

Dr. Stein said that even day-to-day activities were an aggravating factor in causing pain. If the work activity is strenuous on the hips, involving jumping, excessive walking, or running up and down stairs, it would be an aggravating factor. He did not think getting on a creeper would aggravate avascular necrosis. The process of getting on and off it might cause some pain, but Dr. Stein did not think it would accelerate the process of the necrosis. He admitted that if a person has hip pain, bending over to get onto a creeper may cause discomfort. Dr. Stein did not rate claimant with any impairment, stating he recommended waiting until claimant is at least six months postoperative on both sides before being rated.

Dr. Daniel Zimmerman is a board certified independent medical examiner. He examined claimant at the request of his attorney on July 27, 2005. Dr. Zimmerman stated in his report:

> I would agree with Dr. Stein that the causation of the aseptic [avascular] necrosis cannot be predicated on the work functions which Mr. Martin performed in his employment. The aseptic necrosis as Dr. Stein indicated has no known etiology.
>
> Nonetheless, the work history reported by Mr. Martin which is discussed in detail in this report would have caused permanent aggravation and acceleration of the aseptic necrosis. The work activity, heavy in nature, was sufficient, using reasonable medical judgment, to have aggravated the right and left hip aseptic necrosis.[1]

Dr. Zimmerman opined that claimant's work aggravated or accelerated claimant's condition. "The heavy work that he did precipitated and aggravated the collapse of the femoral heads because of the avascular necrosis."[2] He admitted that he was not aware of any studies or articles that justified that opinion.

Using the AMA *Guides*[3], Dr. Zimmerman opined that claimant sustained permanent partial impairment of the right lower extremity at the hip level which would be rated at 75 percent, which is converted to a 30 percent whole person rating. He rated claimant as having sustained a 50 percent permanent partial impairment of the left lower extremity at the hip level, which converted to a whole person rating of 20 percent. Using the Combined Values Chart, Dr. Zimmerman rated claimant as having a 44 percent permanent partial impairment to the body as a whole. He did not apportion any part of the rating to the preexisting condition because "[t]he Guides do not permit a rating for an asymptomatic condition"[4] and claimant did not have symptomatic avascular necrosis in the hips until May 2004.

Although Dr. Zimmerman found that claimant had reached maximum medical improvement, he admitted that, ideally, it would have been better to have waited until claimant recovered longer from his surgeries before he was rated.

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[1] Zimmerman Depo., Ex. 2 at 6.

[2] Zimmerman Depo. at 40.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Zimmerman Depo. at 32.

Dr. Pat Do is certified in orthopedic surgery and is a certified independent medical examiner. Dr. Do's independent medical examination of claimant was also done at the request of ALJ Barnes.

Dr. Do defined avascular necrosis as a disruption of blood supply to the hips and, as a result, the bone dies. Usually the cause of avascular necrosis is unknown, although it could be related to alcohol use, steroid use, or fat embolus. Dr. Do opined that claimant's avascular necrosis was caused by non work-related issues because it was in both hips, which would be unlikely unless it was caused from a systemic cause. Claimant's history of smoking and alcohol use increased his chance of developing avascular necrosis. "However, it is with a degree of reasonable medical probability that the job duties of the patient could have aggravated the underlying condition of avascular necrosis."[5] Dr. Do stated that this condition existed before any alleged problem claimant had at respondent beginning in May 2004.

Dr. Do stated that standing, walking, bending, and squatting could aggravate avascular necrosis. This would be true whether it was done at work or outside of work. Claimant's need for hip replacements would be from the avascular necrosis, which is mostly due to either alcohol, the aging process, or from cigarette smoking. Dr. Do opined that 90 percent of claimant's disability is related to his preexisting condition and his natural aging process and 10 percent is related to work aggravation.

Based on the AMA *Guides*, for claimant's post right hip replacement, Dr. Do rated claimant as having a 37 percent right lower extremity impairment, which converts to a 15 percent whole person permanent impairment rating. For claimant's post left hip replacement, Dr. Do rated claimant as having a 37 percent left lower extremity impairment, which converts to a 15 percent whole person permanent impairment rating. Using the Combined Values Chart, these combine for a total of 28 percent whole person permanent partial impairment rating. Of this 28 percent, Dr. Do opines that 25 percent is attributed to claimant's preexisting avascular necrosis and 3 percent is due to aggravation from claimant's work.

The SALJ concluded that

> claimant's avascular necrosis was not caused as a result of the claimant's work activity, but was a result of claimant's many years of tobacco, alcohol and steroid use, the natural aging process and normal day to day activities. The Court concludes the term "aggravate," when used by Dr. Stein and Dr. Do in their depositions, refers to an increase in symptomatology and does not refer to a change in the physical structure of the body. Therefore the Court concludes the

[5] Do Depo., Ex. 2 at 3.

> claimant has not met his burden of proof and therefore he is not entitled to any benefits pursuant to the Workers Compensation Laws of the State of Kansas.[6]

Except for the reference to steroid use, as there was no evidence that claimant used steroids, the Board agrees with and affirms the SALJ.

The Kansas Supreme Court has held that there are three general categories of risks in workers compensation cases: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character.[7] Only those risks falling in the first category are universally compensable; personal risks do not rise out of the employment and are not compensable.[8] Three cases that are illustrative of these three categories of risks in the context of "personal injury" as defined by K.S.A. 44-508(e) and their interplay with aggravations of preexisting conditions, the natural aging process, and normal activities of day-to-day living, are *Martin*[9], *Boeckmann*,[10] and *Anderson*.[11]

The claimant in *Martin* was a custodian at a public school who suffered from a long history of back problems. Upon arriving at the parking lot of the school, Martin attempted to get out of his vehicle but twisted his back. The court denied compensation, concluding that the risk involved in Martin's accident was not associated with his employment and there were no intervening or contributing causes for the accident. Rather, the risk was personal to Martin. The fact that Martin's back problems could be aggravated by almost any everyday activity bolstered the court's conclusion that his injury was the result of a personal risk.[12]

The claimant in *Boeckmann* was an inspector of truck and tractor tires who suffered from degenerative arthritis of his hips. He underwent an operation on his left hip, but within three years the pain in his right hip began to worsen. Three weeks before his injury, Boeckmann was lying on a conveyor belt. As he got up, he felt a pain in his back. Boeckmann was not able to work for three days. The day of his injury, Boeckmann stooped down to pick up a tire and injured his back. The court denied compensation,

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[6] SALJ Award (Aug. 21, 2006) at 5.

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[8] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[9] *Id.*

[10] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[11] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[12] *Martin*, 5 Kan. App. 2d at 300.

finding that Boeckmann's everyday bodily motions required at work gradually and imperceptibly eroded the physical fibers of his structure. The court further found that any movement would aggravate Boeckmann's condition, regardless of whether the activity took place on or off the job.[13] The Board has described the 1993 amendments to K.S.A. 44-508(e) as a codification of *Boeckmann*.[14]

The claimant in *Anderson* installed convertible tops, headliners, and carpets. Anderson suffered from a long history of back problems. He got in and out of vehicles 20 to 30 times a day, and on one occasion he injured his lower back.

The court distinguished *Anderson* from *Martin* and *Boeckmann*, finding that Anderson's injury followed not only from his personal degenerative conditions but from a hazard of his employment, *i.e.*, the requirement that he constantly enter and exit vehicles. The court found the fact that Anderson's back problems could be aggravated by everyday activities was not controlling.[15]

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[16]

The court determined that Anderson's injury resulted from the combination of his preexisting personal degenerative conditions and a work-related hazard.[17]

Although many of claimant's work activities, such as standing, walking, bending, stooping, squatting, lifting, and carrying can be described as normal activities of day-to-day living, K.S.A. 2004 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. The intent of this statute is to avoid paying workers compensation benefits for conditions that result from risks that are solely

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[13] *Boeckmann*, 210 Kan. at 739.

[14] See, *e.g.*, *Richey v. Kansas Golf Assn., Inc.*, Docket No. 1,000,992, 2002 WL 1838714 (Kan. WCAB July 24, 2002); *Anthony v. PSI Group, Inc.*, Docket Nos. 265,870 and 265,871, 2001 WL 1399482 (Kan. WCAB Oct. 26, 2001); *McConnell v. Farmland Industries, Inc.*, Docket No. 227,052, 1997 WL 802920 (Kan. WCAB Dec. 31, 1997); *Munoz v. Frito-Lay, Inc.*, Docket No. 183,437, 1994 WL 749270, (Kan. WCAB Apr. 18, 1994).

[15] *Anderson*, 31 Kan. App. 2d at 11.

[16] *Id.* (quoting *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001 [1992]).

[17] *Id.* at 12.

personal to the worker.[18] Although this case presents a close question, and the Board acknowledges the record contains medical opinions going both ways on the issue, the Board finds that claimant has failed to prove that if he had not been employed as he was with respondent, he would not be equally injured.[19] In other words, the greater weight of the credible evidence does not establish that claimant's work activities increased his risk of injury or otherwise contributed to his present condition to a greater degree than if he had not been so employed. The greater weight of the expert medical opinion testimony fails to establish that claimant's work activities aggravated and accelerated his avascular necrosis beyond that caused by the natural aging process and his normal activities of day-to-day living. The Board finds this case to be closer to *Boeckmann* than to *Anderson*. As such, claimant has failed to prove that his injuries arose out of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John Nodgaard dated August 21, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Eric K. Kuhn, Attorney for Self Insured Respondent
John Nodgaard, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge

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[18] *Boeckmann*, 210 Kan. 733; *Hensley,* 226 Kan. 256*; Anderson*, 31 Kan. App. 2d 5; *Martin*, 5 Kan. App. 2d 298.

[19] See *Anderson*, 31 Kan. App. 2d at 11.